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IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

*v.*

THE MEAD CORPORATION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## BRIEF OF *AMICUS CURIAE* THE CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION IN SUPPORT OF RESPONDENT

*Of Counsel*:
PETER JAY BASKIN
SHARRETTS, PALEY, CARTER
& BLAUVELT, P.C.
*and*
RICHARD M. BELANGER
POWELL GOLDSTEIN FRAZER
& MURPHY, L.L.P.
*and*
DAVID SERKO
SERKO & SIMON, L.L.P.

SIDNEY N. WEISS*
*President*
*Customs and International*
*Trade Bar Association*
90 Park Avenue
17th Floor
New York, NY 10016
(212) 986-5309

*Attorneys for Amicus Curiae*

* *Counsel of Record*

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Table of Cited Authorities ..... | iii |
| Table of Appendices ..... | viii |
| Brief of *Amicus Curiae* ..... | 1 |
| Interests of *Amicus Curiae* ..... | 1 |
| Statement ..... | 1 |
| Summary of Arguments ..... | 3 |
| Arguments ..... | 4 |
| I. The Sheer Number And Variety Of Customs Classification Rulings Indicate That They Are Not Authoritative Agency Interpretations That Should Legally Bind The Public And The Courts ..... | 4 |
| II. Customs' Classification Rulings Are Interpretive Rules Or Informal Adjudications That Lack The Force Of Law And Therefore Are Not Entitled To *Chevron* Deference ... | 10 |
| III. According Controlling-Weight Deference To Customs Classification Rulings Would Undermine *De Novo* Review Of Such Decisions ..... | 15 |

*Contents*


| | Page |
|---|---|
| IV. While Not Entitled To *Chevron* Deference, Customs Classification Rulings Are Presumed Correct And May Deserve Respect Under *Skidmore* | 17 |
| Conclusion | 20 |




**TABLE OF CITED AUTHORITIES**


| | Page |
|---|---|
| **Cases:** | |
| *Advance Solvents & Chemical Corp. v. United States*, 34 C.C.P.A. 148, C.A.D. 358 (1947) | 15 |
| *American Bayridge Corp. v. United States*, 35 F. Supp. 2d 922 (C.I.T. 1998) | 2 |
| *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962) | 9 |
| *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) | *passim* |
| *Christensen v. Harris County*, __ U.S. __, 120 S. Ct. 1655 (2000) | 3, 4, 14, 17 |
| *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989) | 11 |
| *Investment Co. Institute v. Cams*, 401 U.S. 617 (1971) | 9 |
| *Jarvis Clark v. United States*, 733 F.2d 873 (Fed. Cir. 1984), *reh'g denied*, 739 F.2d 628 (1984) | 17 |
| *The Mead Corp. v. United States*, 185 F.3d 1304 (Fed. Cir. 1999) | 2 |
| *Morton v. Ruiz*, 415 U.S. 199 (1974) | 14 |

Page

*Rapken & Co. v. United States*, 25 C.C.P.A. 268, T.D. 49393 (1938) ..... 18

*Reno v. Koray*, 515 U.S. 50 (1995) ..... 14

*Skidmore v. Swift*, 323 U.S. 134 (1944) .....17, 18, 19

*United States v. Haggar Apparel Co.*, 526 U.S. 380, 119 S. Ct. 1392 (1999) .....1, 3, 15

*United States v. The Baltimore & Ohio R.R. Co.*, 47 C.C.P.A. 1, C.A.D. 719 (1959) ..... 15

*Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978) ..... 16

**Statutes:**

19 U.S.C. § 1502(a) ..... 4, 11

19 U.S.C. § 1514 ..... 5, 8

19 U.S.C. § 1516a(b)(1)(B) ..... 16

19 U.S.C. § 1625 .....2, 11, 13

28 U.S.C. § 1581(h) ..... 3

28 U.S.C. § 2639(a)(1) ..... 17

28 U.S.C. § 2640(a) ..... 15



Page

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7361(c), 102 Stat. 4181 (1988) ..... 8

North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057 (1993) .....2, 11, 12

**Rules:**

Supreme Court Rule 37.3(a) ..... 1

Supreme Court Rule 37.6 ..... 1

**Other Authorities:**

19 C.F.R. Part 174 ..... 2, 5

19 C.F.R. Part 177 .....2, 4, 14

19 C.F.R. § 101.3(b)(1) ..... 5

19 C.F.R. § 174.12(d) ..... 5

19 C.F.R. §§ 174.23-27 ..... 5

19 C.F.R. § 174.25 ..... 14

19 C.F.R. §-174.29 ..... 5

19 C.F.R. § 177.1(a) ..... 4

19 C.F.R. § 177.1(b) ..... 8

*Cited Authorities*


| | Page |
|---|---|
| 19 C.F.R. § 177.1(c) | 5 |
| 19 C.F.R. § 177.2(a) | 5 |
| 19 C.F.R. § 177.9(a) | 8, 12 |
| 19 C.F.R. § 177.9(b)(1) | 8 |
| 19 C.F.R. § 177.9(c) | 2 |
| 19 C.F.R. § 177.10(b) | 8 |
| 19 C.F.R. § 177.10(c) | 2 |
| 19 C.F.R. § 177.11(a) | 5 |
| 19 C.F.R. § 177.12 | 8 |
| Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311 (1992) | 12, 13 |
| Kenneth C. Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5 (3d ed. 1994) | 13 |
| H.R. Rept. 103-361, Pt. 1, 138 (Nov. 15, 1993) | 11 |
| HQ Ruling Letter 953126 | 19 |
| HQ Ruling Letter 089960 | 19 |




*Cited Authorities*


| | Page |
|---|---|
| HQ Ruling Letter 955937, 1994 U.S. Custom NY LEXIS 925 (Oct. 21, 1994) | 7 |
| NY Ruling Letter 864206, 1991 U.S. Custom NY LEXIS 344 (June 19, 1991) | 7, 19 |
| Richard J. Pierce, Jr., *et al.*, *Administrative Law and Process* (3d ed. 1999) | 12 |
| S. Rep. No. 249, 96th Cong., 1st Sess. (1979), reprinted in 1979 U.S.C.C.A.N. 381 | 16 |

## TABLE OF APPENDICES

*Page*

Appendix — Report Of The COAC Subcommittee On OR&R Dated January 26, 2000 ..... 1a



## BRIEF OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3(a) on written consent of all parties, the Customs and International Trade Bar Association (CITBA) respectfully submits this brief *amicus curiae* in support of respondent The Mead Corporation's (Mead) brief.[1]

## INTERESTS OF *AMICUS CURIAE*

CITBA, organized in 1919, is a national professional association of lawyers who practice customs and international trade law before federal courts and agencies with jurisdiction over such matters. This brief reflects the judgment of CITBA members reached in the exercise of their profession and is offered solely to assist in improving our legal system.

CITBA participated in this case as *amicus curiae* on appeal before the U.S. Court of Appeals for the Federal Circuit, and before this Court on consideration of the petition for a writ of certiorari. CITBA also appeared as *amicus curiae* before this Court in 1998 in *United States v. Haggar Apparel Co.*, 526 U.S. 380, 119 S. Ct. 1392 (1999), a case presenting similar issues.

## STATEMENT

At issue in this case is whether the courts must apply the framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), for determining whether an agency interpretation is entitled to deference, to ordinary Customs classification rulings.

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1. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. Further, no person or entity other than CITBA, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

Customs renders classification decisions in numerous formats. Under 19 C.F.R. Part 177, Customs may, in response to a request from an importer or other interested party, issue classification rulings with respect to goods that have not yet been imported, or provide internal advice at the request of a field office regarding goods that have already been imported. Pursuant to 19 C.F.R. Part 174, Customs field officers decide administrative protests of classification determinations made with respect to goods entered at the port. 19 C.F.R. Part 174 also authorizes attorneys in the Office of Regulations and Rulings (OR&R) at Headquarters to issue written decisions on applications for further review of such protests decided by officials at the port of entry. Pursuant to 19 U.S.C. § 1625,[2] Customs may also revoke or modify rulings it has already issued, as Customs did in this case.

Most classification decisions are informal letter rulings, issued to one person, applying the law to a set of facts described in a ruling request. The law applied is the Harmonized Tariff Schedule of the United States (HTSUS) and the issue is whether the scope of a particular tariff subheading encompasses a specific good. Most classification rulings do not set forth detailed, reasoned expositions of the law on a particular matter. They may be issued by a variety of Customs officials with varying levels of expertise and experience at port locations and at the Headquarters level, are rarely subject to notice-and-comment procedures,[3] and if issued with respect to the prospective

2. The U.S. Court of International Trade held in *American Bayridge Corp. v. United States*, 35 F. Supp. 2d 922 (C.I.T. 1998), that the current Customs regulations implementing 19 U.S.C. § 1625, *see* 19 C.F.R. § 177.9(c), are contrary to the plain meaning of the statute as amended by § 623 of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182 (1993).

3. Although certain Customs classification rulings that have the effect of changing an established practice are subject to notice-and-comment procedures and publication in the *Federal Register*, *see* 19 C.F.R. § 177.10(c), the court of appeals expressed no opinion on such rulings. *The Mead Corp. v. United States*, 185 F.3d 1304, 1307 n.1 (Fed. Cir. 1999); Pet. App. 6a.



importation of goods, are not subject to direct judicial review absent a showing of irreparable harm. *See* 28 U.S.C. § 1581(h). Although Customs disseminates some rulings to the public through its web-site, Lexis and Westlaw, not all rulings are published reliably in an official government publication.

## SUMMARY OF ARGUMENTS

Customs classification rulings are not authoritative agency interpretations. Such rulings can be issued by Customs officers at any one of over 300 ports. Customs issues over ten thousand letter rulings each year, and sometimes provides conflicting advice with respect to similar goods, as it did in this case. In addition, Customs revokes or modifies a significant number of its rulings each year. Often, as occurred in this case, such modifications and revocations are made without any explanation of why the previous classification was in error, or why the new classification is more appropriate. Few Customs classification decisions are subject to notice-and-comment procedures.

Customs classification decisions are interpretive rulings or informal adjudications lacking the force of law. It is a well established principle of administrative law that only agency pronouncements having the force of law may be given controlling-weight deference under *Chevron*. Accordingly, the court of appeals correctly determined that Customs classification rulings are not entitled to controlling-weight deference under the framework established in *Chevron*. The court of appeals' decision is consistent with previous decisions of this Court, including the Court's decisions in *Haggar*, 526 U.S. 380, and *Christensen v. Harris County*, __ U.S. __, 120 S. Ct. 1655 (2000). In *Haggar*, this Court held that the legal framework established in *Chevron* applies to Customs regulations promulgated in accordance with notice-and-comment procedures. *Haggar*, 526 U.S. at __, 119 S. Ct. at 1400. In *Christensen*, this Court made clear

that informal opinion letters, like interpretations contained in policy statements, agency manuals and other documents lacking the force of law, do not warrant *Chevron* deference. *Christensen*, __ U.S. at __, 120 S. Ct. at 1662.

Furthermore, according controlling-weight deference to Customs classification rulings would undermine *de novo* review of such rulings. Customs classification rulings involve mixed questions of fact and law that cannot be easily separated. Therefore, it would be extremely difficult for the courts to review the factual elements of a ruling *de novo*, while according controlling-weight *Chevron* deference to the portions dealing with statutory interpretation. The statutory presumption of correctness that Customs classification decisions enjoy is more suitable for evaluating these decisions involving mixed questions of law and fact.

*Amicus curiae* respectfully urges this Court to affirm the decision of the United States Court of Appeals for the Federal Circuit.

## ARGUMENTS

### I. THE SHEER NUMBER AND VARIETY OF CUSTOMS CLASSIFICATION RULINGS INDICATE THAT THEY ARE NOT AUTHORITATIVE AGENCY INTERPRETATIONS THAT SHOULD LEGALLY BIND THE PUBLIC AND THE COURTS

Pursuant to the Congressional delegation of authority contained in 19 U.S.C. § 1502(a), to prescribe regulations "establishing procedures for the issuance of binding rulings," Customs has promulgated regulations which govern the issuance of tariff classification rulings. 19 C.F.R. Part 177. Under the Customs regulations and the relevant statutes in effect at all times pertinent to this action, any importer may request an advance classification ruling from Customs in regard to a prospective importation. 19 C.F.R. §§ 177.1(a),



(c). Such rulings are commonly referred to as pre-importation rulings.

In addition, the Office of Regulations and Rulings ("OR&R") at Customs Headquarters provides Customs field offices with "[a]dvice or guidance as to the interpretation or proper application of the Customs and related laws with respect to a specific customs transaction." 19 C.F.R. § 177.11(a). Such internal advice may address the proper classification of imported merchandise.

Customs also rules on protests of Customs' classification decisions. 19 U.S.C. § 1514; 19 C.F.R. Part 174. Protests are filed at the port of entry where the decision being protested was made. 19 C.F.R. § 174.12(d). The port director or designated personnel allow or deny the protest. 19 C.F.R. § 174.29. A protest may be filed and decided at any of over 300 ports of entry. 19 C.F.R. § 101.3(b)(1). A protesting party may also seek further review of a protest by OR&R at Customs Headquarters, under certain circumstances. 19 C.F.R. §§ 174.23-27.

As can be seen, Customs classification rulings are issued at different administrative levels and by many different offices across the country. By far the most numerous are pre-importation classification rulings which are issued by attorneys in OR&R at Customs Headquarters, by the National Import Specialists of the National Commodity Specialist Division at the port of New York, and by Field National Import Specialists located at the 46 service ports located throughout the United States. 19 C.F.R. § 177.2(a); 19 C.F.R. § 101.3(b)(2).

The National Import Specialists of the Commodity Specialist Division are organizationally a part of OR&R. *See* Treasury Advisory Committee on the Commercial

Operations of the United States Customs Service, Report of the COAC Subcommittee on OR&R (Jan. 26, 2000) ("COAC Report"), Exhibit 2,[4] App., *infra*, 16a. When issuing classification rulings, the Field National Import Specialists located at the 46 service ports work under the direction of the National Import Specialists in New York. Rulings drafted by the Field National Import Specialists are signed by the service port directors. The personnel located at the over 300 ports of entry who rule on tariff classifications during the course of granting or denying protests are not part of OR&R. They are part of the separate Office of Field Operations.

The OR&R attorneys at Customs Headquarters issued 1,328 rulings during the period from July 1998 to June 1999. COAC Report, Exhibit 3, App. 20a. Of these 1,328 rulings, 912 were classification rulings.[5] COAC Report, Exhibit 3, App. 21a. In contrast, the National Import Specialists of the National Commodity Specialist Division located at the port of New York and the Field National Import Specialists located at the 46 service ports issued 11,229 rulings from July 1998 to June 1999. COAC Report, Exhibit 3, App. 20a. Of these 11,229 rulings, 10,986 were classification rulings. COAC Report, Exhibit 3, App. 22a. There are no publicly available data on the percentage of these 11,229 rulings that were issued by the Field National Import Specialists and signed by the service port directors.

In sum, Customs issued a total of 11,898 classification rulings from July 1998 to June 1999, over 92 percent (10,986) of which were issued by the National Commodity Specialist

4. The COAC Report represents the only publicly available source of data known to *amicus* that details the offices at Customs which issue classification rulings and provides some measure of the number of such rulings issued within a specific time frame.

5. During the period from July 1998 to June 1999, OR&R modified or revoked 165 rulings. COAC Report, Exhibit 3, App. 20a.



Division at the port of New York or by the Field National Import Specialists at the service ports.[6]

The degree of legal analysis in a classification ruling can range from extensive in the case of some rulings issued by the OR&R attorneys at Customs Headquarters, to non-existent for virtually all rulings issued by the National Import Specialists and Field National Import Specialists. *Compare* NY Ruling Letter 864206, 1991 U.S. Custom NY LEXIS 344 (June 19, 1991), *with* HQ Ruling Letter 955937, 1994 U.S. Custom NY LEXIS 925 (Oct. 21, 1994).

Classification rulings issued by the National Import Specialists constitute the overwhelming majority of classification rulings issued by Customs. Almost always they contain only a description of the merchandise at issue and a statement of the tariff provision within which Customs classifies the merchandise. In almost every instance, these rulings contain absolutely no legal analysis or other explanation for the position taken by Customs in classifying the merchandise at issue. *See, e.g.*, NY Ruling Letter 864206, 1991 U.S. Custom NY LEXIS 344 (June 19, 1991).

6. No publicly available data reveals the number of protests challenging Customs classification decisions that were ruled on by the ports of entry. However, the COAC Report indicates that OR&R at Customs Headquarters issued 318 rulings in response to importers' applications for further review (AFR) of protests from July 1998 to June 1999. COAC Report, Exhibit 3, App. 21a. In addition, the COAC Report indicates that OR&R issued 71 memoranda of internal advice (IA) to field offices from July 1998 to June 1999. *Id.* Although the 318 rulings on requests for further review and the 71 memoranda of internal advice are included in the 1328 total rulings issued by OR&R from July 1998 to June 1999, it is unknown how many of these rulings on requests for further review and internal advice memoranda dealt with classification issues.

Pre-importation rulings are binding on Customs with respect to the specific transaction ruled on, not on the public, the courts, or the agency generally. 19 C.F.R. § 177.9(a) (pre-importation rulings are binding on Customs Service personnel); *cf.* 19 C.F.R. § 177.1(b) (oral opinions or advice by Customs officials are not binding on the agency). Thus, "binding" means that the an importer is afforded certainty regarding how Customs will treat an importation administratively. The importer, nonetheless, retains the right to challenge the agency's action by filing an administrative protest. In addition, a Customs field officer who disagrees with a pre-importation ruling may request that it be modified or revoked. 19 C.F.R. § 177.9(b)(1).

Congress, concerned by the lack of uniformity in Customs' classification rulings (*i.e,* ruling that the same goods were classified under different tariff provisions), added a statutory provision directing Customs to issue regulations to establish a procedure for ensuring uniformity in decisions regarding classification "with respect to the same, or substantially similar merchandise." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7361(c), 102 Stat. 4181, 4474-75 (1988) (codified at 19 U.S.C. § 1514 Note). Pursuant to this mandate, Customs promulgated 19 C.F.R. § 177.12, which sets forth procedures for dealing with inconsistent rulings.

Classification rulings remain in effect unless modified or revoked. 19 C.F.R. § 177.9(a). Classification rulings are subject to modification or revocation if "found to be in error or no longer in accordance with the current views of the Customs Service." 19 C.F.R. § 177.10(b). Tens of thousands of classification ruling letters are currently in effect.



This Court stated in *Chevron*, 467 U.S. at 844, that when "the legislative delegation to an agency on a particular question is implicit rather than explicit . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Among the considerations listed by the Court in determining the reasonableness of agency action is that "the agency considered the matter in a detailed and reasoned fashion." *Id.* at 865. Even when the Court finds "an express delegation of authority to [an] agency to elucidate a specific provision of the statute by regulation . . . [s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or otherwise manifestly contrary to the statute." *Id.* at 844.

Therefore, implicit in the grant of *Chevron* controlling-weight deference to an agency's interpretation of a statute is the understanding that the agency has provided a "detailed and reasoned" explanation for its interpretation. Absent a "detailed and reasoned" explanation for an agency's interpretation, the courts cannot determine if the agency's interpretation is either "arbitrary, capricious, or otherwise manifestly contrary to the statute" or, at a minimum, "a reasonable interpretation made by the administrator of an agency."[7] *Id.* at 844; *see also Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962) (an agency must present a "rational connection between the facts found and the choice made").

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7. Nor can an agency provide the court with a "detailed and reasoned" explanation for its actions once those actions have been challenged in litigation as "[t]he courts may not accept appellate counsel's post hoc rationalizations for agency action." *Investment Co. Institute v. Cams*, 401 U.S. 617, 628 (1971) (quoting *Burlington Truck Lines v United States*, 371 U. S. 156, 168-69 (1962)).

The overwhelming majority of classification rulings issued by Customs contain no "detailed and reasoned" explanation for the classification decision.

In a situation in which an agency issues well over 10,000 classification rulings per year from over 300 different offices, in a number of different formats, the overwhelming majority of which contain absolutely no legal analysis or other "detailed and reasoned" explanation for the statutory interpretation asserted by the agency, that are binding only on the agency, such rulings simply do not meet the standard necessary to be accorded controlling-weight deference by the courts.

## II. CUSTOMS' CLASSIFICATION RULINGS ARE INTERPRETIVE RULES OR INFORMAL ADJUDICATIONS THAT LACK THE FORCE OF LAW AND THEREFORE ARE NOT ENTITLED TO *CHEVRON* DEFERENCE

Contrary to the petitioner's assertion, Congress has not authorized Customs "to adopt such 'binding rulings prior to the entry of the merchandise' as may be 'necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon.' " Pet. Brief at 19. Rather, Congress authorized the agency to

> establish and promulgate such rules and regulations not inconsistent with the law (*including* ***regulations establishing procedures*** *for the issuance of binding rulings prior to the entry of the merchandise concerned*), and may disseminate such information as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry.



19 U.S.C. § 1502(a) (emphasis added). Although Congress contemplated and sanctioned Customs' existing practice of issuing administrative rulings when it amended 19 U.S.C. § 1502(a) in 1993 to include the parenthetical language relating to binding rulings, *see* North American Free Trade Agreement Implementation Act, § 640, Pub. L. 103-182, 107 Stat. 2057, 2203-04 (1993), there is no suggestion that Congress intended such rulings to have the force of law.

In fact, the legislative history of the parenthetical language in § 1502(a) confirms that Congress did not intend for Customs rulings to have the force of law. The report of the House of Representatives Committee on Ways and Means states that the intent of this language was to "provide greater certainty to importers through the binding rulings program while also permitting Customs to accelerate the entry process." H.R. Rept. 103-361, Pt. 1, 138 (Nov. 15, 1993). Customs had been issuing rulings for years when Congress passed the Customs Modernization Act, and the courts had never viewed such rulings as having the force of law or being entitled to controlling-weight deference under *Chevron*. If Congress had intended to mandate a change so sweeping as to give Customs rulings the force of law, it certainly would have stated so in the statute or in the legislative history. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989) (a "party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change").

To the contrary, Congress at the same time amended 19 U.S.C. § 1625 to provide for procedures relating to the publication, modification, and revocation of a variety of Customs rulings, including ruling letters and internal advice

memoranda, which it collectively referred to as "interpretive rulings." *See* North American Free Trade Agreement Implementation Act § 623, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993). Interpretive rulings interpret and explain pre-existing legislative acts of Congress, but are not legislative acts themselves because they do not impose new duties or obligations. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1313-1315 (1992) (hereinafter "*Interpretive Rules*"); Richard J. Pierce, Jr., *et al.*, *Administrative Law and Process* 308 (3d ed. 1999) ("An interpretive rule interprets or clarifies the nature of the duties previously created by passage of a statute or promulgation of a legislative rule"). Although an agency may, as a practical matter, make interpretive rulings "binding" on private parties by threatening enforcement action if the rulings are not complied with, or by treating the interpretation as dispositive of a matter before the agency,[8] as a legal matter interpretive rules are not binding on the public or the courts. As stated by Professor Anthony:

> The agency treats the interpretation as dispositive of the question involved, and private parties can ignore it only at their peril. The private parties are thus bound practically even though the nonlegislatively promulgated interpretation does not legally bind them: An agency interpretation does not bind the courts and does not of its own force bind the public unless it has been embodied in a legislative rule or other action *carrying the force of law*, as a court is free to arrive at a different interpretation.

8. Customs attempts to make its classification rulings binding on the public in precisely this manner even though its regulations provide that the rulings are only binding on *Customs Service personnel*. 19 C.F.R. § 177.9(a) (emphasis added). Customs' own regulation is an implicit recognition that its interpretive rulings do not have the force of law and cannot bind the public or the courts.



Robert A. Anthony, *Interpretive Rules*, 41 Duke L.J. at 1314 n.6 (1992) (collecting cases) (emphasis added).

In referring to letter rulings and internal advice memoranda as "interpretive rulings" when it amended 19 U.S.C. § 1625 in 1993, Congress is presumed to have understood the long-standing principle that interpretive rules do not bind the public or the courts, and do not have the force of law. Furthermore, since interpretive rulings as defined by Congress under the Administrative Procedure Act cannot have any binding effect on courts or on members of the public, it follows that Congress did not intend to delegate authority to Customs to make policy decisions that bind judges and citizens through use of interpretive rulings. *See generally* Kenneth C. Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 120 (3d ed. 1994).

In authorizing Customs to issue *regulations establishing procedures* for the issuance of binding rulings prior to the importation of merchandise, Congress in no way suggested that such rulings themselves should have the force of law. There is nothing unusual about Congress authorizing Customs to promulgate regulations with the force of law relating to procedures for issuing rulings, while providing that the rulings themselves should be viewed as interpretive rulings without the force of law. The regulations define under what circumstances the agency will issue an interpretive ruling and the minimum information the agency needs to formulate an opinion with respect to various customs matters. Such procedural matters, if provided for in regulations promulgated using notice-and-comment procedures, have the force of law and are entitled to *Chevron* deference. It simply does not follow that the opinions expressed in the rulings are of the same stature.

None of the various formats in which Customs issues classification rulings has the force of law except legislative rules promulgated in accordance with notice-and-comment procedures, with publication in the *Federal Register*. The pre-importation rulings Customs issues pursuant to 19 C.F.R. Part 177 are interpretive rulings, as are requests for internal advice, while decisions on applications for further review by Headquarters of protests decisions made by port directors, pursuant to 19 C.F.R. § 174.25, can be characterized as informal adjudications.

Customs classification rulings lack the force of law and therefore are not entitled to controlling-weight deference under *Chevron*. "Interpretations such as those in opinion letters–like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law–do not warrant *Chevron*-style deference." *Christensen*, __ U.S. at __, 120 S. Ct. at 1662. This is the clear pronouncement of the Court that petitioner seeks to avoid. Such informal interpretations are not subject to the rigors of the Administrative Procedure Act and therefore do not have the force of law and are not entitled to *Chevron* deference. *See Reno v. Koray*, 515 U.S. 50, 61 (1995). "The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974) (citing legislative history).

Thus, while Customs' regulations at 19 C.F.R. Part 177, relating to the agency's general ruling procedures, have the force of law and are entitled to *Chevron* deference, the rulings issued pursuant to those regulations do not have the force of law and are not entitled to such deference.



## III. ACCORDING CONTROLLING-WEIGHT DEFERENCE TO CUSTOMS CLASSIFICATION RULINGS WOULD UNDERMINE *DE NOVO* REVIEW OF SUCH DECISIONS

Protests of Customs' classification decisions, which apply the law to the facts, are subject to *de novo* review in the courts. 28 U.S.C. § 2640(a). Because classification rulings involve mixed issues of fact and law, according such rulings controlling-weight deference under *Chevron* would effectively eliminate *de novo* review for the factual aspects of the rulings.[9] While construction of the terms of a tariff provision is a question of law, full analysis thereof often requires the evaluation of evidence as to the common and commercial meaning of the tariff term at issue, since it is well settled that tariffs are written in the language of commerce. For example, in order to establish the "chief use" of imported goods, positive testimony must be considered. *United States v. The Baltimore & Ohio R.R. Co.*, 47 C.C.P.A. 1, C.A.D. 719 (1959); *Advance Solvents & Chemical Corp. v. United States*, 34 C.C.P.A. 148, C.A.D. 358 (1947).

Requiring the courts to parse the rulings to determine which portions were based on legal interpretations and which on factual determinations would be exceedingly difficult, if not impossible. In contrast, Customs regulations relating to classification, such as the regulation at issue in *Haggar,* are general pronouncements regarding how Customs construes the law, but do not involve the application of the law to specific facts. Congress created a specialized court — originally the Board of General Appraisers, then the Customs Court, and currently the Court of International Trade — to review classification decisions *de novo*. To preserve the

9. As noted above, many rulings issued by the National Import Specialist Division in New York lack any statutory construction to which to accord *Chevron* deference.

Congressionally-mandated standard of review applicable to Customs classification rulings requires that such rulings not be accorded controlling-weight deference under *Chevron*.

The *de novo* standard of review for Customs protest decisions contrasts with the standard for judicial review of antidumping and countervailing duty determinations, which is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). The legislative history of the Trade Agreements Act of 1979 indicates that Congress established a more deferential standard of review for antidumping and countervailing duty determinations because it had entrusted the decision-making authority for complex economic matters relating to subsidies and dumping to the administrative agencies, *i.e.*, the Department of Commerce's International Trade Administration and the International Trade Commission. S. Rep. No. 249, 96th Cong., 1st Sess., at 251-52 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 637-38. The interpretation of the antidumping and countervailing duty laws requires ample policy judgment by the responsible agencies to assure that the laws are administered in a manner that achieves the underlying Congressional intent of remedying the complex unfair trade practices of dumping and subsidization. In contrast, classification decisions are based on the essentially ministerial function of applying revenue-neutral statutory interpretive rules objectively and impartially.

Given the different standards of review applicable to antidumping/countervailing determinations and tariff classification decisions, and the legislative history applicable to each, the Government's citation to cases such as *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978), is inapposite. *Zenith* involved judicial review of the agency's interpretation of the terms "bounty" and "grant" within the



meaning of the countervailing duty statute. It does not follow that the same level of deference is appropriate with respect to tariff classification decisions involving the application of the law to the facts.

## IV. WHILE NOT ENTITLED TO *CHEVRON* DEFERENCE, CUSTOMS CLASSIFICATION RULINGS ARE PRESUMED CORRECT AND MAY DESERVE RESPECT UNDER *SKIDMORE*

Customs rulings enjoy a statutory presumption of correctness. Pursuant to 28 U.S.C. § 2639(a)(1), "the decision of the Secretary of the Treasury . . . is presumed to be correct." That is, the burden is on the importer to prove that the Customs classification decision is incorrect. *See, e.g., Jarvis Clark v. United States*, 733 F.2d 873, 876-78 (Fed. Cir. 1984), *reh'g denied*, 739 F.2d 628 (1984). Although a presumption of correctness and judicial deference are not synonymous, the practical effect of the statutory presumption is that in determining the correct tariff classification of a good, the courts do examine the persuasiveness of the agency's reasoning as expressed in a ruling. The effect of applying the presumption of correctness to such decisions is similar to according them a form of deference, but the presumption of correctness is more suitable for evaluating classification decisions because such decisions involve mixed questions of law and fact.

A majority of this Court ruled in *Christensen* that while interpretive rulings do not warrant *Chevron*-style deference, they are entitled to respect to the extent they persuade the courts by the power of their reasoning. __ U.S. at __, 120 S. Ct. at 1663. Some Customs classification rulings may be entitled to respect under the principles announced in *Skidmore v. Swift*, 323 U.S. 134 (1944). There, this Court held that interpretive rulings, while not controlling upon the

courts by reason of their legal authority, do constitute a body of experience and informed judgment to which courts and the public may properly resort for guidance. *Skidmore*, 323 U.S. at 140. The respect to be accorded such informal interpretations depends on the thoroughness evident in their consideration, the validity of their reasoning, their consistency with earlier and later pronouncements, and all those facts which give such rulings the power to persuade, although lacking power to control. *Skidmore*, 323 U.S at 140.

In customs jurisprudence, the courts have traditionally accorded a *Skidmore*-like respect by evaluating the persuasiveness of the agency's interpretation on a case-by-case basis to assist the court in reaching an independent interpretation of tariff provisions. *See, e.g., Rapken & Co. v. United States*, 25 C.C.P.A. 268, 273, T.D. 49393 (1938) ("long-continued administrative practice may aid in the interpretation of tariff statutes, but it does not preclude the courts from construing or interpreting a statute contrary to such practice . . ."). Some Headquarters rulings contain fairly extensive reasoning and discussion of the tariff classification principles applied to reach the determination expressed therein. However, many classification rulings, particularly those issued by the National Commodity Specialist Division in New York, are one-page classification pronouncements, with little or no analysis. In addition, Customs frequently modifies or revokes its own classification decisions, without explaining or justifying its change in practice. Certainly, the existence of conflicting rulings is a factor to be considered in assessing the persuasive value of a Customs ruling.

For example, contrary to petitioner's assertion on page 17 of its brief on the merits, Customs has not consistently determined that articles similar in design and/or function to Mead's daily planners are classified under subheading



4820.10.20. In 1991, Customs issued ruling letter NY 864206, 1991 U.S. Custom NY LEXIS 344 (June 19, 1991), to Mead's attorneys, advising that the daily planners were properly classified under subheading 4820.10.40. Less than two years later, in ruling letter HQ 953126, 1993 U.S. Custom HQ LEXIS 170 (Jan. 11, 1993), Customs stated: "After further review, concerning the classification of daily planners or multi-function loose-leaf binders, Customs has modified its position on the classification." This latter ruling contains no explanation underlying this change in Customs' position. While Customs sets forth its new position, it did not explain why the previous NY ruling letter was in error, what factors led the agency to change its position, or why the new agency position was more consistent with the statutory language of the competing tariff subheadings. Furthermore, HQ 953126 refers to ruling letter HQ 089960, 1992 U.S. Customs HQ LEXIS 61 (Feb. 10, 1992), in which Customs had ruled that loose-leaf pocket agendas were classifiable under subheading 4820.10.20. Since Customs did not revoke NY 864206 until 1993, this reference to HQ 089960 reveals that two valid Customs rulings existed simultaneously in 1992, providing for inconsistent tariff treatment of goods that Customs later determined should be classified under the same subheading.

The facts of this case illustrate that while some Customs classification rulings may earn the courts' respect under *Skidmore*, the courts should carefully examine such rulings for consistency, persuasiveness, and other characteristics that give interpretive rulings the power to persuade.

## CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully asks this Court to affirm the judgment of the U.S. Court of Appeals for the Federal Circuit.

Respectfully submitted,

*Of Counsel*:
PETER JAY BASKIN
SHARRETTS, PALEY, CARTER
& BLAUVELT, P.C.
*and*
RICHARD M. BELANGER
POWELL GOLDSTEIN FRAZER
& MURPHY, L.L.P.
*and*
DAVID SERKO
SERKO & SIMON, L.L.P.

SIDNEY N. WEISS*
*President*
*Customs and International*
*Trade Bar Association*
90 Park Avenue
17th Floor
New York, NY 10016
(212) 986-5309

*Attorneys for Amicus Curiae*

* *Counsel of Record*

# APPENDIX

# APPENDIX — REPORT OF THE COAC SUBCOMMITTEE ON OR&R DATED JANUARY 26, 2000

*Serko & Simon LLP*
*Counsellors at Law*
*Customs & International Trade Law*

*One World Trade Center — Suite 3371*
*New York, N.Y. 10048*
*212-775-0055 Facsimile: 212-839-9103*
*E-mail: serko-simon@customs-law.com*
*Internet: http://www.customs-law.com*

January 26, 2000

REPORT OF THE COAC SUBCOMMITTEE ON OR&R

The Committee has completed the first phase of its work plan: if now has information on the current structure, staffing, workload and performance of OR&R. The information confirms the anecdotal information which had created the concern that Customs Headquarters has not been issuing rulings in the timely fashion desired and needed by the trade community. The information also suggests a range of opportunities to improve performance.

The Committee is indebted to Customs, specifically to Stuart Seidel, Assistant Commissioner Office of Regulations & Rulings, John Durant, Director Office of Regulations & Rulings and Jeff Laxague, for its candid and constructive cooperation in this first phase. We wish to report our findings as to performance and the opportunities for improvement. It is our hope that customs will find this a useful report for it

to develop and implement strategies and defined objectives for achieving improvements in its mandated role under the Mod Act in assisting to achieve informed compliance by timely rulings.

Customs developed and provided information on rulings issued in the fiscal year ending September, 1999 — but did not have statistics from earlier years. The complete statistical report (Exhibit 1) is attached to this memorandum, and the following comments about its contents is offered by the Subcommittee.

Customs also provided information showing the structure of OR&R. The attached Diagram (Exhibit 2) demonstrates the range of work handled by ORR. In recent years, the workload of OR&R has expanded as its has taken on new activities, such as training of foreign customs services and issuance of more than fifty (50) Informed Compliance Publications. In fiscal year 1999 (October 1, 1998 to September 30, 1999) Customs issued 11,307 "New York" rulings and 1,261 Headquarters rulings. However, attorney staffing levels fell to 87 in 1999, from a high of 117 in 1990.[1]

While Customs acknowledged at the COAC meeting in Portland on October 8, 1999, that at that time the rulings program as a whole was not an OR&R "priority", we are pleased to report that the subcommittee' review demonstrated Customs has adopted priorities that are reflective of the needs of industry: rulings on prospective business plans are issued

1. As of September 13, 1999 there were 82 attorneys; and 87 attorneys as of October 1, 1999.



more quickly (164 days on average) than ruling on on-going imports (236 days and 277 days on average for internal advice and applications for further review); origin and marking rulings (which affect the packaging decisions which often arise later than production decisions) are made more rapidly (106 days on average) that other substantive decisions (ranging from 174 days for value rulings to 478 days for drawback decisions). The review also demonstrates that Customs National Import Specialists have efficiently and timely issued the "non-controversial" classification, NAFTA and Origin/making rulings within their jurisdiction (20 to 30 days on average).

An apparent indication of improved performance from July 1, 1999 through October 1, 1999 is the reduction of open case backlog from 1,931 pending cases as of July 1, 1999 to 1,651 as of October 1, 1999.[2]

However, the performance today for Headquarters rulings does not meet standards of timeliness. The average times for issuing Headquarters decisions are not short enough to accommodate the needs of businesses seeking advice in advance of importations or production, or seeking resolution of disputes with Customs over the treatment of imports. Six months is too long to wait for value and classification decisions on prospective transactions. 478 days for drawback decisions is unacceptable. In fact, Customs has conceded in written statements to the Congress that it has not achieved its objective to issue rulings within 120 days. We believe

2. Comparison made from use of Exhibit 2 and Exhibit 3. Data obtained from Customs on September 9, 1999.

that Customs does not move as rapidly as other agencies which issue binding rulings to businesses reliance upon agency action. We believe that comparative information and standards should be developed.

The next phase of the work plan is to provide suggestions to Customs to assist its efforts to improve its performance to the point at which United States Customs can safely hold itself out as a model to the world as the most efficient, uniform, predictable and transparent decision-maker on matters affecting imports.

Customs needs to give a priority to improvement in performance: prospective timely rulings are critical for US companies to make decisions to enter into new business activities and to compete globally; other rulings are needed to eliminate uncertainty as to costs after entering into a series of transactions.

We cannot take on the role of managing the OR&R process. However, we can comment on outputs and performance, make recommendations on approaches to improve performance and continue a dialogue with Customs on its performance and plans for improved performance. In this regard, the Committee makes the following observations:

1. The diminished resources and increased workload of ORR should be addressed. The Customs budget should be increased to accommodate the workload so binding rulings can be given their Mod Act priority. Consideration should also be given to reassignment of the other responsibilities such as



training of foreign Customs authorities to other departments, or to the privatization of some of these functions.

2. Customs should explore ways to reduce the number of requests made of it. This might be accomplished by more targeted seminars for importers, issuing binding rulings in a fashion that allows more importers to take advantage of them without making their own requests.

3. Customs should explore more efficient ways to issue "HQ" rulings. This might be accomplished through a streamlined process involving different uses of meetings; including NISs in the process essentially after freeing up their time from diminished numbers of routine requests.

4. Customs should institutionalize a system which measures its performance and establishes targets to be achieved through its performance plan. The reports of performance, improvement plan and goals should be shared with this committee and the import community.

The Committee welcomes the opportunity to work with all members of COAC and with the Customs Service to identify additional opportunities for speeding up the issuance of Headquarters rulings.

*Appendix*

Respectfully submitted,

/s/ DAVID SERKO
David Serko
Chairman, COAC
Subcommittee on OR&R and
Fermin Cuza
Frank Kelly
Lee Sandler

Distribution: members of COAC and Treasury representatives



*Appendix*

**EXHIBIT 1**

[Seal omitted]

**United States Customs Service**
**United States Department of the Treasury**

OFFICE OF REGULATIONS AND RULINGS
U.S. CUSTOMS SERVICE
1300 PENNSYLVANIA AVENUE, NW, ROOM 3.4-A
WASHINGTON, D.C. 20229
U.S.A.

TEL: 202-927-0760
FAX: 202-927-1875

**FACSIMILE TRANSMITTAL SHEET**

DATE: 12-2-99 TOTAL PAGES (+ COVER PAGE): 8

TO: Dave Serko FROM: Jeff Laxague

MESSAGE: Per Mr. Seidel's instructions

*Appendix*

OR&R Standard Reports for External Distribution
Fiscal Year 1999: October 1, 1999 to September 30, 1999



*Appendix*

**1. Rulings — OR&R Office Totals:**

| | Oct. 1998 – Sept. 1999 | % of total |
|---|---|---|
| HQ | 1261 | 10 |
| NY | 11307 | 90 |
| Total | 12568 | 100 |
| Modifications & Revocations | 150 | 1.3 |
| | # | % |
| Rate increases | 32 | 33 |
| Rate decreases | 64 | 67 |
| Tariff changes | 96 | 100 |

*Appendix*

**2. HQ Rulings By Type**

| | Oct. 1998 – Sept. 1999 | % of total | Avg # days |
|---|---|---|---|
| Prospective | 670 | 53 | 164 |
| IA | 81 | 6 | 236 |
| AFR | 302 | 24 | 277 |
| Reconsideration | 208 | 17 | 228 |
| Total | 1261 | 100 | 206 |

**3. HQ Rulings By Issue**

| | Oct. 1998 – Sept. 1999 | % of total | Avg # days |
|---|---|---|---|
| Classification | 806 | 64 | 198 |
| Value | 186 | 15 | 174 |
| Origin/Marking | 175 | 14 | 106 |
| Drawback | 36 | 3 | 478 |
| Other | 58 | 4 | 345 |
| Total | 1281 | 100 | 206 |



*Appendix*

**4. NY Rulings**

| | Oct. 1998 – Sept. 1999 | % of total | Avg # days |
|---|---|---|---|
| Classification | 11035 | 98 | 20 |
| NAFTA | 142 | 1 | 30 |
| Origin/Marking | 130 | 1 | 29 |
| Total | 11307 | 100 | 29 |

**5. Non-Ruling Advice**

| | Oct. 1998 – Sept. 1999 |
|---|---|
| HQ | |
| Drawback Contracts | 258 |
| IPR Recordations | 1220 |
| Total | 1478 |
| NY | |
| CAP (PreClass) | 1289 |
| Other Advice | 1884 |
| Total | 3173 |

*Appendix*

**6. HQ Open Case Backlog, as of 10-1-99**

| | # open | % | #>120 days | % of>120 | % of total |
|---|---|---|---|---|---|
| Class Branches | 660 | 40 | 425 | 45 | 26 |
| Value Branch | 132 | 8 | 59 | 6 | 4 |
| Origin Branch | 109 | 7 | 55 | 6 | 3 |
| Drawback Branch | 209 | 13 | 109 | 11 | 7 |
| Other Branches | 541 | 32 | 305 | 32 | 18 |
| Total | 1651 | 100 | 953 | 100 | 58 |



*Appendix*

**7. OR&R Staffing Resources**

Full-time and part-time, actual on board, October 1999.

HQ:

| | |
|---|---|
| Attorneys | 86 |
| Paralegals | 17 |
| Other | 18 |
| Sub-total | 121 |

NY:

| | |
|---|---|
| Import Spec. | 98 |
| Other | 23 |
| Sub-total | 121 |
| OR&R Total: | 242 |

*Appendix*

**8. OR&R Attorney Staffing as of 10-1-99**

| Branch | Managers | Attorneys | Total |
|---|---|---|---|
| General Class. | 1 | 10 | 11 |
| Duty & Refund | 1 | 6 | 7 |
| Textiles | 1 | 9 | 10 |
| Special Class. | 0 | 7 | 7 |
| Value | 1 | 8 | 9 |
| Regulations | 1 | 7 | 8 |
| Penalties | 1 | 12 | 13 |
| Entry & Carriers | 1 | 5 | 6 |
| IPR | 0 | 4 | 4 |
| FOIA | 0 | 4 | 4 |
| International | 1 | 3 | 4 |
| AC | 2 | 2 | 4 |
| Total | 10 | 77 | 87 |



*Appendix*

**9. HQ Resource Utilization**

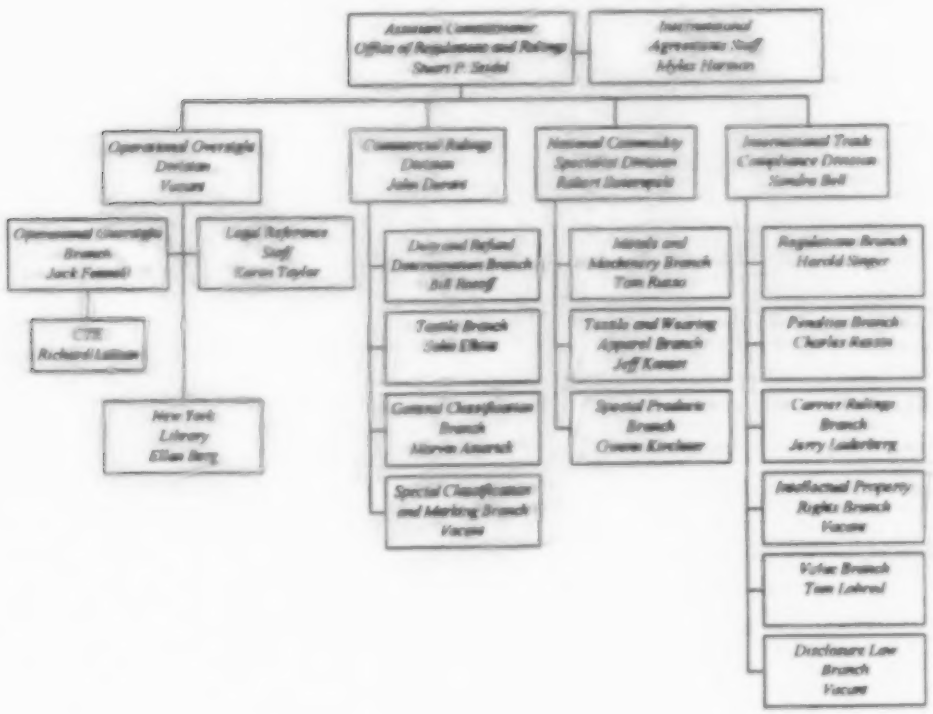
Time Period: October 1, 1998 to September 30, 1999

| | % of total |
|---|---|
| Rulings | 45 |
| Informed Compliance | 4 |
| Field/HQ Support | 16 |
| Congress | 2 |
| International | 6 |
| Other Agency | 2 |
| Regulations | 4 |
| Other (Admin) | 21 |
| Total | 100 |

*Appendix*

**EXHIBIT 2**

*Office of*
*Regulations and Rulings*






*Appendix*

**EXHIBIT 3**

[Seal omitted]

UNITED STATES CUSTOMS SERVICE
Office Of Regulations & Rulings
1300 Pennsylvania Avenue, NW.
Ronald Reagan Building – 3rd floor
Washington, D.C. 20229

Main Number: 202-927-0760
FAX: 202-927-1875

FAX TRANSMISSION

DATE: 9-30-99

TO: Dave Serko

FROM: Jeff Laxague

COMMENTS: COAC data

Number of Pages 8

*Appendix*

[Seal omitted]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

September 30, 1999

Mr. David Serko
Chairman, COAC
Subcommittee on OR&R
One World Trade Center
Suite 3371
New York, NY 10048

Dear Mr. Serko:

This is in response to your letter dated September 23, 1999, requesting information on OR&R workload and resources.

The information you requested is enclosed. However, I must qualify the data, by stating that the information is preliminary and not final. We are still validating the data. Also, I would note that the data only covers the time period July 1, 1998 to June 30, 1999. In response to testimony given by the GAO to the Trade Subcommittee on the Ways and Means Committee in 1997, we completely revised our method of tracking and reporting the activities of the office. That new system has only been fully implemented since July 1,1998. We will, however, be updating these tables on a quarterly basis and will be happy to provide you with the most recent statistics.



*Appendix*

I would be happy to answer any questions you may have about the tables, or you can contact Jeff Laxague of my staff at (202) 927-0505.

Sincerely,

/s/ STUART P. SEIDEL
Stuart Seidel,
Assistant Commissioner
Office of Regulations and Rulings

Enclosures

*Appendix*

**1. Rulings — OR&R Office Totals:**

| | July 1998 – June 1999 | % of total |
|---|---|---|
| HQ | 1328 | 11 |
| NY | 11229 | 89 |
| Total | 12557 | 100 |
| Modifications & Revocations | 165 | 1.3 |



*Appendix*

**2. HQ Rulings By Type**

| | July 1998 – June 1999 | % of total | Avg # days |
|---|---|---|---|
| Prospective | 695 | 52 | 154 |
| IA | 71 | 5 | 283 |
| AFR | 318 | 24 | 281 |
| Reconsideration | 244 | 19 | 134 |
| Total | 1328 | 100 | 186 |

**3. HQ Rulings By Issue**

| | July 1998 – June 1999 | % of total | Avg # days |
|---|---|---|---|
| Classification | 912 | 69 | 199 |
| Value | 174 | 13 | 150 |
| Origin/Marking | 197 | 15 | 119 |
| Drawback | 31 | 2 | 463 |
| Other | 14 | 1 | 168 |
| Total | 1328 | 100 | 186 |

*Appendix*

**4. NY Rulings**

| | July 1998 – June 1999 | % of total | Avg # days |
|---|---|---|---|
| Classification | 10986 | 98 | |
| NAFTA | 137 | 1 | |
| Origin/Marking | 100 | 1 | |
| Total | 11229 | 100 | |

**5. Non-Ruling Advice**

| | July 1998 – June 1999 |
|---|---|
| HQ | |
| Drawback Contracts | 242 |
| IPR Recordations | 1302 |
| Total | 1544 |
| NY | |
| CAP (PreClass) | 1315 |
| Other Advice | 1435 |
| Total | 2750 |



*Appendix*

**6. OR&R Attorney Staffing as of 9-23-99**

| Branch | Managers | Attorneys | Total |
|---|---|---|---|
| General Class. | 1 | 10 | 11 |
| Duty & Refund | 1 | 6 | 7 |
| Textiles | 1 | 9 | 10 |
| Special Class. | 0 | 7 | 7 |
| Value | 1 | 8 | 9 |
| Regulations | 1 | 7 | 8 |
| Penalties | 1 | 12 | 13 |
| Entry & Carriers | 1 | 5 | 6 |
| IPR | 0 | 4 | 4 |
| FOIA | 0 | 4 | 4 |
| International | 1 | 3 | 3 |
| Total | 8 | 75 | 82 |

*Appendix*

**7. HQ Backlog, as of 7-1-99**

| | # open | % | #>120 days | % of>120 | % of total |
|---|---|---|---|---|---|
| Class Branches | 682 | 35 | 361 | 41 | 19 |
| Value Branch | 147 | 8 | 82 | 9 | 4 |
| Origin Branch | 117 | 6 | 48 | 6 | 2 |
| Drawback Branch | 224 | 11 | 121 | 14 | 6 |
| Other Branches | 761 | 40 | 278 | 31 | 15 |
| Total | 1931 | 100 | 888 | 100 | 46 |



*Appendix*

**7. OR&R Staffing Resources**

Full-time, actual on board, August 1999.

HQ:

| | |
|---|---|
| Attorneys | 85 |
| Paralegals | 17 |
| Other | 18 |
| Sub-total | 120 |

NY:

| | |
|---|---|
| Import Spec. | 100 |
| Other | 19 |
| Sub-total | 119 |

OR&R Total: 239